No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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EXPLANATION OF LETTERING OF CERTAIN EXHIBITS.

Before commenting on the reply brief of plaintiff in error we desire to call the attention of the court to the fact that some confusion may arise with regard to the exhibits which form a part of the record in this case because among the exhibits introduced at the trial were several which were attached to the depositions of Romeo, Lodato, Longo, Grasso and Galanos filed in this court on February 27, 1922, under a stipulation and order. These defendants' exhibits are lettered "A" to "U4" both inclusive, and are entirely different from the original exhibits of defendants lettered "A" to "F", which were not attached to the depositions and which were filed

in this court as a part of the record on appeal on December 1, 1921. In our opening brief in referring to defendants' exhibits by letter we were in all cases except two referring to the exhibits attached to the depositions above mentioned. On pages 29 and 30 of our opening brief in referring to exhibits "B" and "C" the original exhibits not attached to the depositions were meant. On page 28 we discussed a contract between defendant in error and F. A. Mennillo which was known as exhibit "A", referring to one of the original exhibits not attached to the depositions.

DISCUSSION OF REPLY BRIEF OF PLAINTIFF IN ERROR.

We do not find it necessary to reply to the arguments made in answer to the technical points we urged in our opening brief and we submit those propositions on our points and authorities already on file. We desire, however, to point out that plaintiff in error has made no answer to the proposition that it is not entitled to complain of the insufficiency of the evidence to justify the verdict because the bill of exceptions before this court does not contain any specifications of insufficiency of the evidence. In addition to the authorities cited by us on this point at page 7 of our opening brief, we cite the following recent California cases:

Gosliner v. Briones, 62 Cal. Dec. 659; 204 Pac. Rep. 19, decided December 14, 1921;

Edwards v. Wilson, 36 Cal. App. Dec. 1048; 204 Pac. 39, decided December 21, 1921.

Furthermore plaintiff in error attempts to evade the issue on the proposition that it cannot contend here that the verdict is against law because it did not move for a directed verdict at the conclusion of the case, when it contends as follows:

> "No motion was made for a directed verdict by reason of the fact that the court undertook not only to instruct as to law, but on the facts and, therefore, if there was no evidence in the record sustaining the contention of the defendant, the court erred in instructing the jury as to the matters of fact which they could consider in weighing the evidence in favor of the defendant".

Plaintiff in error does not and of course cannot cite any authorities for this novel attempt to lift itself by its boot-straps. The law is clear as shown by the cases cited by us on pages 6 and 7 of our opening brief that the required motion for a directed verdict must be made at the conclusion of the presentation of the evidence and *before* the court instructs the jury generally. The instructions given by the trial court, no matter what their content, could not possibly relieve plaintiff in error from its default in failing to ask for a directed verdict *before* the trial judge commenced to charge the jury.

With regard to the instructions, we note that plaintiff in error has not replied to the suggestion on page 21 of our opening brief, that at most it could only discuss one proposition in the charge to the jury because only one attempt at a specific exception to the charge appears in the record (Record,

p. 123). We reiterate our contention that this attempt to take an exception not in the presence of the jury was futile. (Brief for Defendant in Error, pp. 26-27.)

In not referring to the other technical points argued in our opening brief we are not admitting the validity of plaintiff in error's reply to them.

For the reasons given in our opening brief and herein we request that the judgment be affirmed.

Dated, San Francisco,
April 1, 1922.

Respectfully submitted,
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